NO. 89-1336

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

RUTH RUSHEN, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS,
Petitioner,

vs.

JOHNNY SPAIN, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NINTH CIRCUIT COURT OF APPEALS

BRIEF FOR RESPONDENT SPAIN IN OPPOSITION

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QUESTIONS PRESENTED

1. HAVING RECOGNIZED THE APPLICABILITY OF 28 U.S.C. §2254(d) TO A STATE COURT'S DECISION TO SHACKLE A CRIMINAL DEFENDANT, DID THE LOWER FEDERAL COURTS ERR IN REFUSING TO APPLY A PRESUMPTION OF CORRECTNESS WHEN THE STATE COURT FAILED TO HOLD A HEARING ON, OR MAKE FINDINGS IN SUPPORT OF, ITS SHACKLING DECISION?

2. SHOULD THIS COURT GRANT CERTIORARI TO REVIEW A FACTUAL FINDING THAT A CRIMINAL DEFENDANT'S CHAINING AT HIS CALIFORNIA TRIAL WAS UNNECESSARY, WHEN CALIFORNIA SUBSEQUENTLY LOST THE PART OF THE RECORD UPON WHICH THE FINDING WAS LARGELY BASED?

3. SHOULD THIS COURT REVIEW A FACTUAL RULING THAT A CRIMINAL DEFENDANT'S BEING PAINFULLY SHACKLED TO HIS CHAIR PREJUDICIALLY AFFECTED HIS DEFENSE?

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STATEMENT OF THE CASE

Respondent largely accepts petitioner's jurisdictional statement and statement of the case, but must rectify significant omissions. When Spain's conviction was reviewed by the California Court of Appeal, the court, failing to find a "due process determination" by the state trial court as to why Spain had been chained, assumed for the purpose of its decision that Spain's chaining had been unconstitutional. (Petition, Appendix D at 125.) The principal issue on federal habeas thus was whether that

illegal chaining had deprived Spain of a fair trial.

Spain's shackling, which is never described by California in its petition, was no doubt unique in an American courtroom: for eighteen months he sat before a jury in leg irons, handcuffs, and a waist chain pinning him to the courtroom floor. (Petition, Appendix A, at 9743-9746.)

The state trial court having refused to hold a hearing on the effect of the chains on Spain, the District Court directed the Magistrate to take testimony and render findings on the question. (Petition, Appendix B, at 78.) California's petition fails to present those findings to this Court, although the District Court and Ninth Circuit opinions rest almost entirely upon them. In sum, those factual findings are:

1. Petitioner's shackling at trial aggravated his existing medical and psychological problems, and pained and preoccupied him during that time.

2. Petitioner's shackling interfered with his ability to communicate with his trial counsel and to participate in the preparation of his own defense.

3. Petitioner's shackling impeded his ability to testify on his own behalf.

(Petition, Appendix A, at 9744-45.)[1]

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[1] These findings have raised a dispute which would seem to require Justice Kennedy's recusal. Judge Noonan in dissent argues that rather than accepting the District Court's factual findings in this case, the majority should have embraced factual findings concerning Spain incorporated in an opinion written by Justice Kennedy while he was on the Ninth Circuit. (See Petition, Appendix A, at 9776-9789),

ARGUMENT

I. INTRODUCTION

The primary function of this Court is the decision of important questions of law; perhaps in a rare case it will grant certiorari simply to correct a grave miscarriage of justice. If a petition for certiorari calls for the exercise of neither function, however, this Court's resources cannot be expended resolving a petitioner's quarrels with a lower court's reading of an individual record.

For this reason California's petition should be denied. The legal principles and precedents relied on by the Ninth Circuit Court of Appeals are commonplace and are left unchallenged by petitioner. Spain's release in 1988 from incarceration certainly does not cry out for corrective action. To the contrary, as even Judge Noonan acknowledged

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[Noonan, dissenting], citing Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979).) California expressly invokes the name of Justice Kennedy (Petition, at 39) in urging this Court to adopt a particular reading of Spain v. Procunier, which concerned Spain's shackling. As framed by Judge Noonan and petitioner, the issue before this Court requires a determination of the relative accuracy of the factual findings of the majority below as opposed to those of then Judge, now Justice, Kennedy in Spain v. Procunier.

A federal judge should avoid even the appearance of partiality. Liljeberg v. Health Services Corp., 486 U.S. ___, 100 L.Ed.2d 855, 872-73 (1988). This need for recusal is most compelling when a justice comes to this Court from a lower court where he passed on an issue that is then presented to the Court. Laird v. Tatum, 409 U.S. 824, 835 (1972). See also 28 U.S.C. §47 (No judge shall hear or determine an appeal from the decision of a case or issue tried by him.)

in dissent, Spain has become a paradigm of the capacity for human redemption: teaching since freed at major universities, writing constructively on the problem of criminality, and serving as a symbol of reconciliation between the two races to which he belongs. Furthermore, as is discussed below, newly available evidence of his innocence has ensured that he will never be returned to prison on the charges herein at issue.

As Spain will demonstrate, California's "Questions Presented" rest on a series of factual assertions about the nature of the record below. Those factual assertions are, quite simply, wrong, and were rejected by the lower courts after a careful review of the enormous record. If this Court were to grant a writ of certiorari, it would eventually conclude that the lower courts' reading of the record was accurate. The far better course, however, is to decline to engage in a meaningless exercise by denying certiorari.

II. SINCE THE LOWER FEDERAL COURTS AGREED THAT STATE COURT FINDINGS OF FACT IN SUPPORT OF A DECISION TO SHACKLE ARE SUBJECT TO THE "PRESUMPTION 0F CORRECTNESS" PROVISION OF 28 U.S.C. §2254(d), THIS CASE DOES NOT FRESENT A QUESTION OF LAW AS TO THE SCOPE OF THAT PROVISION.

California asks this Court to grant certiorari in order to confirm that state court factual findings in support of a decision to shackle a criminal defendant are entitled to a presumption of correctness under 28 U.S.C.

§2254(d). (See Petition, at 20, 23-27.) In this case, however, the District Court expressly agreed that a shackling decision falls within the ambit of §2254(d) and is entitled to a presumption of correctness unless, of course, one of the statutory exceptions to the presumption's reach is applicable. (See Petition, Appendix B, at 74-75.) The District Court found, based on a careful review of the record, that no factual findings as to the necessity of chaining Spain had been made by the state trial court to which it could defer. (See Petition, Appendix B, at 76-79, citing §2254(d)(1)-(3), (6)-(7) (Federal courts statutorily barred from awarding presumption of correctness when factual issue not resolved by means of full and fair hearing in state court)).

California's quarrel with the action of the lower federal courts thus centers not on whether section 2254(d) is applicable to state shackling decisions -- all agree it is -- but with the District Court's holding, affirmed by the Circuit, that the state of the record brought Spain's case within the statutory exceptions to the general rule of §2254(d). It should be remembered that the state appellate court agreed that the state trial court had failed to make a "due process determination" as to whether Spain should be shackled, and assumed for the purpose of its decision that Spain had been erroneously chained at trial. It was on this ruling of the state appellate court that the District Court

relied in distinguishing Sumner v. Mata, 449 U.S. 539, 545-47 (1981) (Petition, Appendix B, at 78 n.3) Thus California is asking this Court to comb the state record in order to decide a factual question -- whether it contains findings as to the necessity for Spain's shackling -- that has been resolved against petitioner by the California Court of Appeal, the District Court, and the Ninth Circuit.[2] This Court does "...not grant a certiorari to review evidence and discuss facts." United States v. Johnston, 268 U.S. 220, 227 (1925).

III. SINCE CALIFORNIA CHALLENGES THE LOWER COURTS' APPLICATION OF COMMONLY APPLIED LEGAL STANDARDS GOVERNING SHACKLING, RATHER THAN THE STANDARDS THEMSELVES, ITS PETITION RAISES AN ISSUE OF FACT RATHER THAN ONE OF LAW

California concedes that in deciding Spain's chaining was unconstitutional, a conclusion with which the state appellate court had not differed, the District Court and the Ninth Circuit applied propositions drawn from this

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[2] The record consists of tens of thousands of pages of transcripts from an eighteen month state court criminal trial, thousands of state court documents, video tapes of state court proceedings which were carefully viewed by the district court, and transcripts of an extended evidentiary hearing held before a federal magistrate. The Circuit's opinion reveals a stunning familiarity with this gargantuan conglomeration, demonstrating that the panel indeed fulfilled its obligation to examine the entire state record. Understandably, this painstaking work was tremendously time-consuming, decision of Spain's appeal taking three years. As Justice Noonan noted of the panel, the decision was "a difficult one for all of us and has required extensive deliberation." (Petition, Appendix A, at 9774.)

Court's decision in Illinois v. Allen, 397 U.S. 337 (1970) and consistent with the opinions of "other federal and state courts." (Petition, at 27-28.) California can point to no conflict between the Ninth Circuit's decision and a shackling ruling of any other state or federal court. That failure in itself justifies denial of the petition.

California's true objective is not the resolution of an important question of law, but the obtaining of yet another review of the factual record. It complains that at his state court trial Spain did not request a reduction in his shackling (Petition, at 34), although the Circuit found he did. (Petition, Appendix A, at 29-30.) Similarly, California disputes the Circuit's conclusion that Spain gave the state court the option of excluding him from trial (Petition at 35), thereby demanding that this Court read the extensive record on which the Circuit rested that conclusion. This Court does not grant certiorari on such fact-intensive issues.[3]

Furthermore, the state of the record defeats any appellate claim by California that Spain's shackling was necessary. The District Court concluded that shackling was not required, specifically finding that a) Spain had not been particularly disruptive; and b) any disruption on his part

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[3] See New York v. Kleppe, 429 U.S. 1307, 1311 (1976) (Mr. Justice Marshall, in chambers) (Four justices would not grant certiorari "on such a fact-intensive issue").

was caused by the chains themselves.[4] The District Court expressly rested its findings on its careful examination of, inter alia, Exhibit 18, a set of videotapes from the state court trial purportedly recording all of Spain's disruptive behavior. See Spain v. Rushen, 543 F.Supp. 757, 779 (N.D.Cal. 1982); (Petition, Appendix B, at 82.) In order to challenge this ruling of the District Court, California would have to present Exhibit 18 to this Court for review[5], and then convince this Court that the District Court's factual findings arising from its examination of this exhibit were not "plausible". Amadeo v. Zant, 486 U.S. ____, 100 L.Ed.2d 249, 260 (1988), citing Anderson v. Bessemer City, 470 U.S. 564, 573-574 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse

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[4] "[D]espite the pain and humiliation, throughout the 203 days of trial, the government points to only three instances in which petitioner misbehaved in front of the jury (see Exhibits 17 and 18). Under the circumstances, it is reasonable to surmise that had petitioner not been shackled, or shackled with less burdensome restraints, even those three incidents would not have occurred." (Petition, Appendix B, at 82.)

[5] It was Exhibit 18 upon which the state trial court relied after Spain's trial to justify his chaining. (Petition, Appendix B, at 75.) Because Exhibit 18 concerned events occurring after the decision to shackle Spain, the District Court ruled that it logically could not explain or justify that decision. (Id. at 76). Nonetheless, the District Court reviewed the exhibit before making its factual finding concerning the "necessity" issue. If the state hopes to argue that Exhibit 18 does prove the "necessity" for Spain's shackling, it obviously must produce the exhibit.

it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.").

The state, however, has lost Exhibit 18. Following the District Court's examination of it in 1982, the exhibit was returned to the state, and the state was unable to locate it after filing its present appeal.[6] As appellant, it is the California's burden to prove to this Court that the District Court's factual findings are unsupported by the evidence, an impossible task now that the state has deprived this Court of the evidence upon which those findings rest. The lower court found as fact that Spain's disruptive actions were minor and caused by his shackles. The District Court's conclusion that the shackles were unnecessary follows ineluctably from those findings, and is thus immune from challenge on appeal.

IV. CALIFORNIA'S CHALLENGE TO THE HOLDING OF THE LOWER FEDERAL COURTS THAT SPAIN'S UNCONSTITUTIONAL SHACKLING DEPRIVED HIM OF A FAIR TRIAL CONSISTS SOLELY OF AN ATTACK ON FINDINGS OF FACT, AND DOES NOT MERIT A GRANT OF CERTIORARI.

Finally, California wishes to challenge the lower courts' conclusion that Spain's shackling affected the reliability of the fact-finding process and deprived him of a

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[6] Spain's understanding of the status of Exhibit 18 is based on conversations with the Ninth Circuit's docket clerk, who enlisted Spain's counsel in the hunt for the exhibit. Spain's counsel has been informed that while other videotapes of the trial were located, those comprising Exhibit 18 were not. While other tapes can show the extent of Spain's chaining, they can provide no justification for it.

fair trial. In so arguing, California plainly has attempted to hide the ball. The rulings of the Magistrate, the District Court, and the Ninth Circuit that Spain's chaining was prejudicial all rested on pure findings of fact: that the shackling pained and preoccupied Spain, aggravated his medical problems, interfered with the preparation of his defense, and impeded his ability to testify on his own behalf. (Petition, Appendix B, at 9744-45.)

Supported by ample evidence, these findings must be respected under this Court's decision in Amadeo v. Zant, supra. The issue of prejudice thus raises no question of law. California's failure to discuss these factual findings in its petition is a transparent endeavor to obscure that the Circuit's factually rooted decision is not worthy of certiorari.

V. SPAIN NEVER SHOULD BE RETURNED TO PRISON ON THE CHARGES HEREIN AT ISSUE.

Although dissenting, Judge Noonan took pains to express his impression of the extraordinary man at the center of this case:

> John ("Johnny") Spain is a complex, intelligent human being. Through no fault of his, he was subjected to terrible suffering as a child. The outrages inflicted on him and the deep alienation he experienced in childhood undoubtedly account for the attitude he formed and the rage that was expressed in the homicidal outburst which he committed in 1967. Since that date he has spent almost all his life in prison. In recent years, according to information

> submitted in this case, he has been a model prisoner. He has inspired the unswerving and devoted service of his present counsel. No human being is beyond redemption. Johnny Spain appears to be a changed man. If it were our function to exercise the powers of clemency vested in the governor of California and to forgive what he has done, we might well exercise those powers.

(Petition, Appendix A, at 9793-94)

Noonan's allusions are to the story fully documented in Spain's successful application for bail pending appeal, a story including his birth into a white family in Jackson, Mississippi in 1949; the community's growing hostility when it became obvious his father had been black; and the loss of his family when threats of violence forced his white mother to abandon him to adoption by a black family in Los Angeles when he was six.

Imprisoned at seventeen and given a chance to be free of his chains after 1976, Spain has proven the truth of the claim the state trial court refused to heed: rather than being a violent or disruptive person, he is a thoroughly thoughtful and dignified individual who would have conducted himself in an exemplary manner at trial if released from bonds reminiscent of the days of slave trading. Once unchained, Spain was a superb college student, a master electrician, an inventor, a powerful voice for peace in racially divided prisons, in sum, perhaps the most respected and trusted inmate in the entire California Corrections

system. In 1986, before the District Court's writ was issued, more than ninety guards and other prison officials wrote statements supportive of Spain's release on parole, a showing probably unmatched in the history of the California parole board. Since his release on bail in 1988, he has taught courses at Stanford and U.C. Berkeley, published scholarly articles[7], and been active in youth counseling programs.

Spain's remarkable achievements demonstrate the unfair nature of the decision to shackle him during his state court trial. They also strongly suggest that he was convicted of the San Quentin crimes not because he was guilty of them, but because, as held by the District Court, his chains made him appear capable of their commission while precluding him from dispelling that impression. A fair trial is needed if the issue of Spain's guilt or innocence is ever to be laid properly to rest.[8]

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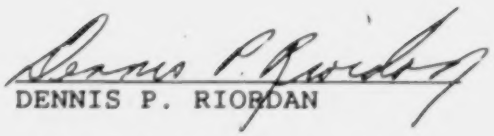
[7] See, e.g., Spain, "Society Behind Bars", Stanford Humanities Review, Vol. I. Nos. 2-3, at p.10

[8] That is particularly so given that the legal theory on which Spain was convicted has since been discredited in subsequent legal proceedings. State authorities have never maintained nor offered evidence that Spain personally inflicted any physical violence on a guard or inmate on August 21, 1971, but rather prosecuted Spain on the theory that he, a close friend of George Jackson, joined a conspiracy between Jackson and attorney Stephen Bingham to effect Jackson's escape from San Quentin and thus was criminally liable for any violence occurring on that day. The state Court of Appeal held that Spain did not commit the murders of which he was convicted, but rather was found guilty on a theory that the murders were a consequence of a

CONCLUSION

For the reasons stated, California's petition for certiorari should be denied.



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Bingham-Jackson escape conspiracy which Spain joined (Petition, Appendix D, at 100-101.) The state appellate court noted that, as charged, Spain could not be "legally accountable" for the murders "if there were no conspiracy between Jackson and Bingham" (Id.) In 1986, a state court jury, having heard evidence not available at the time of Spain's trial -- the testimony of Stephen Bingham (who was not tried until ten years after Spain) -- found that there had been no Bingham-Jackson conspiracy and acquitted Bingham of all charges against him. (Petition, Appendix B, at 64-65 n.1).

PROOF OF SERVICE BY MAIL -- 1013(a), 2015.5 C.C.P.

RUSHEN, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS
vs. JOHNNY SPAIN, No. 89-336

I am a citizen of the United States; my business address is 523 Octavia Street, San Francisco, California 94102. I am employed in the City and County of San Francisco, where this mailing occurs; I am over the age of eighteen years and not a party to the within cause. I served the within

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

JOHN H. SUGIYMAMA
Senior Asistant Attorney General
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I certify or declare under penalty of perjury that the foregoing is true and correct. Executed on April 4, 1990 at San Francisco, California.

Laura L. Perry

Laura L. Perry